Supreme Court, U.S.
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No. _____

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In The
Supreme Court of the United States
October Term, 1998

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FRANCISCA CASTILLO, GILBERT CASTILLO, as Administrator of the Estate of JESUS CASTILLO,
Deceased,
Petitioners,

vs.

CITY OF ROUND ROCK, TEXAS, OFFICER MICHAEL H. KINCAIDE, (#4101), CORPORAL THOMAS C. JACOBS, (#1404) and OFFICER SAMMY LEDESMA (#4112),
Respondents.

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On Petition for Writ of Certiorari To The
United States Court of Appeals
For the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the police practice of restraining an arrestee, face-down, with hands and feet cuffed (hog-tied position) and pressure applied to the back sufficient to cause death or serious bodily injury from positional asphyxia objectively reasonable as a matter of law?

2. Is the police policy of restraining an arrestee, face-down, with hands and feet cuffed (hog-tied position) and pressure applied to the back sufficient to cause death or serious bodily injury from positional asphyxia constitutionally protected as a matter of law from claims of deliberate indifference to a substantial risk of severe medical harm?

3. Is the police practice of restraining an arrestee, face-down, with hands and feet cuffed (hog-tied position) and pressure applied to the back sufficient to cause death or serious bodily injury from positional asphyxia an objectively unreasonable application of deadly force contrary to the teachings of *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), and *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)?

4. Does the Court of Appeals for the Fifth Circuit ruling in *Colston v. Barnhart,* 130 F.3d 96 (5th Cir. 1997), pet. reh'g en banc denied, 146 F.3d 282 (5th Cir. 282 (5th Cir. 1998, cert. denied, ____ U.S. ____ (1999), applied here so as to allow interlocutory review of excessive force, use of deadly force, and deliberate indifference to medical needs claims where the district court denied summary judgment, finding that material fact issues regarding the

actions taken by police officers existed, violate the rule in *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), and *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), and the finality rule of 28 U.S.C. § 1291 which prohibits interlocutory review of issues of law not separable from the fact determinations necessary to their resolution?

LIST OF ALL PARTIES TO THE PROCEEDING IN COURT BELOW

This action was initiated by FRANCISCA CASTILLO, GILBERT CASTILLO, as Administrator of the Estate of JESUS CASTILLO, Deceased,

OFFICER MICHAEL H. KINCAIDE, (#4101), CORPORAL THOMAS C. JACOBS, (#1404) and OFFICER SAMMY LEDESMA (#4112) are the Defendants in this case and is properly designated in the present caption.

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I. The Supreme Court should grant this petition for writ of certiorari because the Court of Appeals' holding, as matter of law, that the police practice of handcuffing the hands and feet of an arrestee in a prone position while exerting pressure on their back (a practice known as "hog-tying") to the point of causing positional asphyxia is a

constitutionally reasonable permissible practice violates the teaching of Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) and Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d. 1 (1985). 11

II. The Supreme Court should grant this petition for writ of certiorari to resolve the conflict between the Seventh and Eighth Circuits (Estate of Phillips v. City of Milwaukee, 123 F.3d 586 (7th Cir. 1997) and Maynard v. Hopwood, 105 F.3d 1226 (8th Cir. 1997) which have held that forcing an arrestee into a prone position with hands and feet cuffed ("hog-tying") as pressure is applied to their back is objectively reasonable as a matter of law and the Fifth Circuit Court of Appeals which finds said police practice to be a clearly established violation of the Fourth Amendment prohibition against unreasonable searches and seizures. See, Simpson v. Hines, 903 F.3d 400 (5th Cir. 1990) and Gutierrez v. City of San Antonio, 139 F.3d 441 (5th Cir. 1998). 12

III. This Court should grant certiorari because the Fifth Circuit's extra-jurisdictional consideration of the interlocutory appeal based on qualified immunity squarely conflicts with Johnson v. Jones, 515 U.S.

304 (1995), which holds that a defendant may not appeal a district court summary judgment order denying qualified immunity insofar as that order determines whether or not the pre-trial record sets forth a genuine issue of fact for trial. 22

IV. This Court should exercise its supervisory power and grant certiorari because the Fifth Circuit's decision is a significant departure from the accepted and usual course of judicial proceedings in that the Fifth Circuit opinion effectively makes every denial a qualified immunity immediately appealable, in violation of the limited interlocutory review permitted by Johnson, supra, and Behrens, supra. 28

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In The
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FRANCISCA CASTILLO, GILBERT CASTILLO, as Administrator of the Estate of JESUS C STILLO,
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CITY OF ROUND ROCK, TEXAS, OFFICER MICHAEL H. KINCAIDE, (#4101), CORPORAL THOMAS C. JACOBS, (#1404) and OFFICER SAMMY LEDESMA (#4112),
Respondents.

On Petition for Writ of Certiorari To The
United States Court of Appeals
For the Fifth Circuit

The Petitioners, Francisca Castillo and Gilbert Castillo, as Administrator of the Estate of JESUS CASTILLO, Deceased, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this

case entered on March 15, 1999.

OPINIONS BELOW

The panel opinion denying the Petitioner's Petition for Rehearing is not reported, but is reprinted hereto in the Appendix at A-2. The panel opinion of the Court of Appeals for the Fifth Circuit is not published pursuant to Federal Rules of Appellate Procedure - Fifth Circuit Local Rule 47.5 and is reprinted in Appendix A hereto ("App. A") at page A-4. The order of the District Court, signed February 2, 1998, and filed on the same date, is not reported, and is set out in the appendix at page A-14.

JURISDICTION

The Petition for Rehearing was denied on May 4, 1999. (App. A-2) The Fifth Circuit Court of Appeals entered its judgment on March 15, 1999. (App. A-4)

The jurisdiction of this Court is invoked under 28 U.S.C.

§§ 1254(1) and 2101(c).

CONSTITUTIONAL, STATUTORY, REGULATORY & RULE PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution set out in its entirety in the Appendix at A-1. Additionally, this case involves the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983 which is set out in its entirety in the Appendix at A-1. This case also involves Fed. R. Civ. P. 56(c), set out in its entirety in the Appendix at A-1.

STATEMENT OF THE CASE

With all due respect to the Fifth Circuit Court of Appeals and recognizing the immense burden of the overworked resources of the Court, the Petitioners, nevertheless, respectfully, but most vigorously object, to the factual resuscitation by the Fifth Circuit Court of Appeals, whose opinion incorrectly states, or adopts as fact, accounts solely from the standpoint of the police officer.

The Fifth Circuit neither mentioned nor credited the Affidavit of the Chief Medical Examiner of Travis County, Texas, who performed the autopsy on Jesus Castillo; the opinion of police tactics expert, Dr. Peter Scharf; or the numerous eyewitness statements all contained in the Plaintiffs' Response to Defendant's Motion for Summary Judgment.[1]

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[1] In connection with the circuit court's rendition of the facts, it is significant that the Fifth Circuit Court of Appeals Rules require that the complete record of the case remain at the trial court during the appeal process, therefore, the Fifth Circuit Court of Appeals did not have the benefit of the full record when it issued its decision. Specifically, the oral deposition of Defendant police officer, Michael Kincaide, which was considered by the trial court, was not before the Fifth Circuit Court of Appeals during its consideration of this case.

Clearly, Officer Kincaide's deposition was before the trial court for the purposes of summary judgment. At the hearing on Defendants' Motion for Summary Judgment, the Defendants' objection to Plaintiff's counsel's reference to Kincaide's deposition, based on it not being part of the record, was overruled by the magistrate.

Officer Kincaide's deposition is attached as A-97 and the transcript of the hearing on Defendant's Motion for Summary Judgment before Magistrate Alan D. Albright is attached hereto as A-29. On page 29 of the transcript, Magistrate Albright's ruling leaves no doubt that Officer Kincaide's deposition was included in the

The summary judgment evidence which was before the trial court and upon which the court based its denial of the police offices' motion for summary judgment presented the following facts:

1. Jesus Castillo, a thirty-nine year-old Hispanic male, died of anoxic encephalopathy due to cardio respiratory arrest, known as positional asphyxia, caused by oxygen deprivation as a result of the application of weight to the back of a prone person handcuffed, face-down, such that the person suffers oxygen deprivation and eventual death by positional asphyxia from pressure. (A-33, A-44)

2. Placing an arrested person, who is being handcuffed in a prone position will not only cut off oxygen, but also causes the subject to struggle to catch a breath with such a struggle often resulting in more pressure being applied. (A-33)

3. Placing a suspect in a prone position with pressure applied to their back while handcuffed with their hands behind their back from four to six minutes, is a classic example of the substantial risk of death or serious bodily injury by positional asphyxia. (A-33)

4. Jesus Castillo was mentally ill and on January 5, 1995,

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record and considered by the court.

was walking in shorts in 30 degree weather on Interstate 35 and Highway 620, in Round Rock, Travis County, Texas. (A-4)

5. The Round Rock Police Department was called to the scene after Jesus Castillo had taken a twelve-pack of beer and some popcorn from a Texaco station that had recently been owned by his family, although it was not so owned at the time on January 5, 1995. (A-97)

6. Michael Kincaide, a Round Rock police officer, who had known Mr. Castillo since they were children and who attended high school with him and who knew that Jesus Castillo was "not normal" was the first officer upon the scene. (A-97; Kincaide depo., vol. I, p.68)

7. Officer Kincaide ordered Jesus Castillo to put down the beer, and he complied. (A-101)

8. Mr. Castillo raised his hands as if to surrender when ordered to do so by Officer Kincaide. (Witness Statement Marlyn Michael Hart, appendix II.B.11, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment; R.684-881)

9. Jesus Castillo never threatened the officers nor raised the beer bottle in a threatening manner. (A-101)

10. Officer Kincaide was aware of the fact that Mr. Castillo's family had recently owned the Texaco station from which Mr. Castillo allegedly took the beer and popcorn. (A-97; Kincaide depo., vol. I, p.68)

11. Officer Kincaide shoved his knee into Mr. Castillo's neck area and stayed in that position for a period of five to ten minutes. (Witness Statement of Andres Leal, attached as appendix II.B.14, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment)

12. Officer Kincaide and others remained on Mr. Castillo's back while he was handcuffed with his hands behind him and his feet handcuffed for a period of four to ten minutes. (Witness Statement of Andres Leal, attached as appendix II.B.14, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment; also, A-33)

13. While bound with his hands behind his back in a "hog-tied" position, Mr. Castillo yelled out a number of times that he was going to die and stated, "God, please help me!" (Witness Statement of Andres Leal, attached as appendix II.B.14, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment; Walter David Barrera, appendix II.3.D, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment; R.684-881)

14. While bound, with officers on his back and his hands tied in a "hog-tied" position, Mr. Castillo shouted, "it is time for me to die!" (Witness Statement of Andres Leal, attached as appendix II.B.14, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment; Walter David Barrera, appendix II.3.D, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment; R.684-881)

15. Mr. Castillo turned blue while Officer Kincaide and the

others were on his back. (A-33)

16. An ambulance was called for the purpose of assisting Officer Kincaide with numerous injuries and not to help Mr. Castillo. (A-4)

17. When the ambulance did arrive, it was discovered that Mr. Castillo was not breathing. The ambulance transported Mr. Castillo to a hospital. (A-4)

18. When the ambulance arrived, Mr. Castillo's vital signs indicated that his brain was severely deprived of oxygen at a level indicating that brain death had occurred. (Emergency Medical Services Records, attached as appendix II.E, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment)

19. Mr. Castillo was taken off life support and died shortly thereafter. (A-4)

20. The Travis County Medical Examiner, Dr. Roberto Bayardo, conducted an autopsy as required by Texas law and concluded that Officer Kincaide had adequate time to recognize Mr. Castillo's breathing difficulties since a person's heart will not stop beating due to lack of oxygen unless they have gone without breathing for at least three to four minutes, even during a struggle. (A-44)

21. Officer Kincaide had adequate time to investigate and determine Mr. Castillo's condition. (A-33)

22. The severe risk of death and serious bodily injury from

positional asphyxia was a commonly known problem about which a reasonable officer should have been aware of on or about January 5, 1995. (A-52)

23. Well-known police agencies, such as the International Association of Police Chiefs and the National Institute of Justice had repeatedly warned police departments concerning the risks of positional asphyxia when force such as that used by Officer Kincaide is applied to the back of a prone suspect with their hands handcuffed behind them (often called "hog-tying") and that widely acknowledged and recognized professional papers on positional asphyxia had been published in police journals and other law enforcement literature since the late 1980s and that placing weight on the back of a prone handcuffed person with weight applied to their back for a period of several minutes is an unreasonably dangerous police procedure and one that was widely known and extensively discussed in law enforcement literature since the 1970s. (A-52)

24. That there were at least six (6) adult males on top of Mr. Castillo during the struggle, including three (3) Round Rock police officers, including Officer Kincaide. (A-52, A-59)

25. Hog-tying or handcuffing behind the back while in the face down, prone position has long been recognized by reputable police agencies as a life threatening tactic and prohibited by police regulations. (A-59)

26. The Fifth Circuit Court of Appeals concluded, based on the

facts as stated above in the light most favorable to the non-movant, that:

a. the degree of force exerted under the circumstances was not unreasonable, either quantitatively or qualitatively;
b. the officers did not deliberately disregard Jesus Castillo's health needs;
c. that the procedures used by the officers were well within police norms;
d. both the time and extent of the force used on Jesus Castillo were reasonable, if not minimal;
e. that the abandonment of force and commencement of concern for the health of Jesus Castillo were timely and appropriate;
f. that there was no constitutional violation by the Round Rock police officers.

PROCEEDINGS BELOW

The District Court granted the Defendant's Motion for Summary Judgment on the Plaintiffs' Fifth and Eighth Amendment claims. The District Court denied the Defendant's summary judgment motion based on qualified immunity on Plaintiffs' Fourth and Fourteenth Amendment claims. The court specifically found that "there are material fact issues which

preclude it from determining whether the Defendant's actions were 'objectively reasonable,'" as noted by the court. Among those factual disputes are the cause of the altercation between Kincaide and Mr. Castillo, the manner in which Mr. Castillo held the beer bottle, the extent to which Mr. Castillo allegedly resisted the arrest, as well as the length of time he resisted the officer's efforts to restrain him, and the length of time that Mr. Castillo was held in a prone position. It is also disputed as to whether or not Mr. Castillo notified the officers that he was in extreme pain and was "going to die."

A panel of the Fifth Circuit reversed and rendered in an unpublished opinion. (A-4) Plaintiffs' Petition for Rehearing was denied on May 4, 1999. (A-2)

REASONS FOR GRANTING THE PETITION

I. The Supreme Court should grant this petition for writ of certiorari because the Court of Appeals' holding, as matter of law, that the police practice of handcuffing the hands

and feet of an arrestee in a prone position while exerting pressure on their back (a practice known as "hog-tying") to the point of causing positional asphyxia is a constitutionally reasonable permissible practice violates the teaching of *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) and *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d. 1 (1985).

II. The Supreme Court should grant this petition for writ of certiorari to resolve the conflict between the Seventh and Eighth Circuits (*Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997) and *Maynard v. Hopwood*, 105 F.3d 1226 (8th Cir. 1997) which have held that forcing an arrestee into a prone position with hands and feet cuffed ("hog-tying") as pressure is applied to their back is objectively reasonable as a matter of law and the Fifth Circuit Court of Appeals which finds said police practice to be a clearly established violation of the Fourth Amendment prohibition against unreasonable searches and seizures. *See, Simpson v. Hines*, 903 F.3d 400 (5th Cir. 1990) and *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998).

This Court should grant certiorari because the constitutional limitations placed on the use of deadly force are of extraordinary importance given that the use of deadly force amounts to the potential extra-judicial summary imposition of the death penalty in every case. The extraordinary importance of the

proper limits to be placed on the government's use of deadly force is self-evident. The absence or erosion of these limitations permit the government to summarily impose the death penalty without due process or other judicial oversight.

This Court, in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), held that, "all claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather that under a 'substantive due process' approach." *Supra*, 490 U.S. at 395, 104 L.Ed.2d. at 454. The reasonableness inquiry in an excessive force case is an objective one. "The question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham, supra,* at U.S. 397.

In the instant case, the Defendant officers utilized a degree of force which resulted in the death of Jesus Castillo. Specifically, the police officers first attacked the deceased by knocking a beer bottle out of his hand without provocation at a moment when Mr. Castillo raised his arms to surrender in compliance with the officers' commands. Most significantly, however, Officer Kincaide then proceeded to force Mr. Castillo to the ground in a prone position. Mr. Castillo's hands were pulled behind him while persons sat on him. Mr. Castillo's hands were handcuffed tightly behind him, and his legs were also cuffed. Officer Kincaide shoved his knee into Mr. Castillo's neck during the restraint. Officers sat on Mr. Castillo to hold him down. Mr. Castillo remained in this unfortunate restraint between five and ten minutes. Once the officers realized Castillo's condition, it was too late. He became unconscious at the scene, never to awake again.

Notwithstanding the well-known and substantial risks of

positional asphyxia and the actions resulting in positional asphyxia, the Fifth Circuit held, as a matter of law in this case, that the force described above and utilized by the Round Rock police officers was reasonable, "if not minimal." The Circuit Court's decision has granted permission to police officers across the country to use deadly force irregardless of the danger or risk posed by the suspect. (A-4) Petitioners contend that the force utilized by the Defendant officers constituted deadly force and was "unreasonable" as a matter of law under *Graham v. Conner, supra*, and *Tennessee v. Garner, supra*.

In *Garner,* the U.S. Supreme Court held that police use of "deadly force" violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious harm, either to the officer or to others. 471 U.S. at 11, 105 S.Ct. at 1701. "Deadly force" is not necessarily limited to the use of guns, but may be any force "carrying with it a

substantial risk of causing death or serious bodily harm." *Robinette v. Barnes*, 854 F.2d 909, 911-12 (6th Cir. 1988).. *Also, see,* Tex. Penal Stat. Ann. § 1.07(17); Tex. Code of Crim. P. Ann. art. 6.06, "An Officer uses deadly force only in situations which indicate that he or another person may be seriously injured or killed if such deadly force is not used."

Contrary to the Fifth Circuit's opinion, placement of a person's body who has participated in a strenuous activity in a prone position with his hands handcuffed behind him and weight placed upon his back, carries with it a substantial risk of causing death or serious bodily harm, and, therefore, constitutes "deadly force." This is established by Petitioners in their summary judgment proof through the Affidavit of Dr. Roberto Bayardo, the Chief Medical Examiner of Travis County, Texas (A-33), and through the Declaration of Peter Scharf, an expert in law enforcement procedures. (A-52)

Rather than properly allow the Plaintiff to submit evidence on Defendants' actions as constituting "deadly force" for consideration by the fact finder, the Fifth Circuit completely ignored the issue of "deadly force" and Plaintiffs' summary judgment evidence. Viewing the summary judgment evidence in the light most favorable to the plaintiff (Dr. Bayardo's affidavit and Dr. Scharf's declaration), questions of fact were presented on the issue of "deadly force." *See, Chew v. Gate*, 27 F.3d 1432 (9th Cir. 1994) (suggesting that whether a given tool or instrument in certain circumstances is "deadly force" is a question of fact). In essence, the Fifth Circuit approved utilizing "deadly force" against an unarmed, mentally ill citizen who had not committed any violent crime at the time of his seizure by the defendant police officers.

Other circuits place more severe limitations on the use of deadly force. *See, Gilmere v. City of Atlanta, Georgia*, 774 F.2d

1495, 1502 (11th Cir. 1985) (en banc) (the unwarranted beating and shooting of the plaintiff, which directly resulted from his efforts to escape the officers' further physical abuse, gave grounds for relief under the Fourth Amendment); *Davis v. Little*, 851 F.2d 605, 607 (2nd Cir. 1988) (shooting of unarmed citizen running toward back of car unlawful); *Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) (material questions of fact precluded summary judgment regarding shooting of disturbed man who held police at bay with knife and was subsequently shot because of man's actions, even if dangerous, threatening, or aggressive, did not necessarily pose a threat of serious physical harm).

One of the most glaring conflicts exist between the Fifth Circuit's holdings, in *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998) and *Simpson v. Hines*, 903 F.2d 400 (5th Cir. 1990), and the Seventh and Eighth Circuits' decisions in

Estate of Phillips v. City of Milwaukee, 123 F.3d 586 (7th Cir. 1997) and *Maynard v. Hopwood*, 105 F.3d 1226 (8th Cir. 1997), respectively. These cases involve the death of an arrestee in police custody. In *Gutierrez*, the arrestee died of being hog-tied and placed in a prone position with his face down. The arrestee in *Simpson* was also left in a prone position with hands and feet cuffed. In *Simpson*, as in the instant case, an officer sat on the arrestee's back. In *Estate of Phillips*, the medical examiner stated the cause of death as "sudden, unexpected death associated with law enforcement restraint." 123 F.3d at 590. Mr. Phillips, like Mr. Castillo, had been placed in a prone position, face down, with both his hands and feet handcuffed and weight placed on his back. The *Maynard* arrestee was hog-tied. The plaintiffs in each case argued that the officers' actions constituted deadly force and was unreasonable under the Fourth Amendment.

The *Gutierrez* court properly held that the existence of

"deadly force" is a question of fact, while the *Estate of Phillips'* and *Maynard's* courts decided the "deadly force" issue as a matter of law. The courts' opinions in *Estate of Phillips* and *Maynard,* established the constitutionality, as a matter of law, of the police practice which resulted in the arrestee's death. As in the instant case, these courts denied the plaintiffs an opportunity to present all of the evidence, including the critical evidence of the credibility of the officers, to the trier of fact.

The Fifth Circuit's opinion in the instant case also creates a confusing intra-circuit conflict. The instant case conflicts with both *Gutierrez, supra*, and *Simpson, supra*. The *Simpson* facts are similar to those herein. In *Simpson,* the plaintiff decedent was a prisoner in a local jail. When he refused to submit to a search and brandished a marijuana cigarette, two law enforcement officers entered his cell. A struggle ensued with the officer defendants later contending that Simpson violently resisted their efforts to search

his pockets, however, plaintiff maintains that Simpson was struggling in self-defense. One officer put his arm around Simpson's neck, while other officers grabbed Simpson's arms and legs. The officers forced Simpson to the floor and attempted to handcuff him while another officer sat on his chest. Unable to restrain Simpson in this position, they rolled Simpson on his stomach and cuffed his hands and legs behind his back. Simpson died as a result of the struggle with the custodial death report stating that he was asphyxiated during a struggle to subdue him. Although the court in *Simpson* utilized the standard for determining excessive force in *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981), the standard in *Shillingford* is more stringent than that pronounced in *Graham, supra,* therefore, the court's decision would be the same under the *Graham* analysis. The court, in *Simpson*, found that, in viewing the record in the light most favorable to the plaintiffs, that the officers who entered

Simpson's cell reasonably should have known that in subduing and searching Simpson they maliciously used force which was grossly disproportionate to the need and was calculated to injure Simpson severely. The plaintiff satisfied a much greater burden in *Simpson* under *Shillingford* than a plaintiff faces under the *Graham* standard for determining excessive force. Clearly, *Simpson* conflicts with the instant case. Guidance from this Court is required to clarify a perplexing and confusing array of lower court decisions.

III. This Court should grant certiorari because the Fifth Circuit's extra-jurisdictional consideration of the interlocutory appeal based on qualified immunity squarely conflicts with *Johnson v. Jones*, 515 U.S. 304 (1995), which holds that a defendant may not appeal a district court summary judgment order denying qualified immunity insofar as that order determines whether or not the pre-trial record sets forth a genuine issue of fact for trial.

This Court has explicitly distinguished between the interlocutory appealability of orders that resolve legal wrangles

and those that determine evidence sufficiency. Evidence sufficiency disputes are not appealable. *Johnson v. Jones*, 515 U.S. 304 (1995). Specifically, "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court summary judgment order insofar as that order determines whether or not the pre-trial record sets forth a 'genuine issue of fact for trial'." 515 U.S. at 314.

In *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834 (1996), the Court clarified that "every" denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact, and *Johnson* does not mean that every denial of summary judgment is non-appealable. 516 U.S. at _____, 116 S.Ct. at 842. However, "if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that a particular conduct occurred, the question decided is not truly 'separable' from the

plaintiff's claim, and hence, there is no 'final decision' . . ." *Id.* This is the issue presented to this Court.

All that *Behrens, supra*, really added to the case law was an authorization for an appellate court to sift through the record to see if a defendant is entitled to qualified immunity, even if accepting is true, all of the properly admitted evidence favorable to the plaintiff in those cases where the trial court does not make clear the factual basis supporting its opinion. This is completely different from authorizing the appellate court to evaluate or weigh the merits of the items of evidence. The only issue that a defendant can properly raise on interlocutory appeal is the legal correctness and the standard that the trial court applied to its conduct.

Johnson and *Behrens* refer only to the limited review required to decide the distinct legal question of whether the conduct alleged by the plaintiff violated then clearly established

law.

As set forth in the dissent authored by Judge DeMoss, in *Colston v. Barnhart*, 146 F.3d 282, 286 (5th Cir. 1998) (on application for rehr'g en banc) (DeMoss, J., dissenting), "an increasingly complex panorama of doctrine and dissent . . . have evolved as the courts of appeal have struggled to reconcile the holdings of *Johnson* and *Behrens*." The Courts of Appeal are in complete disarray in applying *Johnson* and *Behrens*, and there is no consistency either within circuits or between the circuits in the application of these cases. Most notable in demonstrating a lack of consensus are the Fifth Circuit's eight to eight vote in *Colston, supra,* and the Fourth Circuit's seven to five vote in *Elliott v. Leavitt*, 105 F.3d 174 (4th Cir. 1997). *See,* Motz dissent at 179. The lack of consistency is apparent throughout the circuits. There appears to be little rhyme or reason to the conflicting determinations of whether to exercise appellate jurisdiction over

interlocutory appeals based on qualified immunity. In many cases, including the above two hotly disputed cases, the appellate court has exercised jurisdiction. *See also, Lee v. Sandberg*, 136 F.3d 194 (2nd Cir. 1997) (finding jurisdiction despite trial court's conclusion that a jury could find that the state trooper's actions in arresting Mr. Lee were objectively unreasonable); *Turner v. Scott*, 119 F.3d 425, 428 (6th Cir. 1997) (although district court found that genuine issues of material fact precluded summary judgment, jurisdiction exercised where court accepted plaintiff's version of events as true).

In other cases, appellate courts have found that they lack jurisdiction. *See, Carter v. Rhode Island*, 68 F.3d 9, 12 (1st Cir. 1995) (issue of whether supervisor had discriminatory intent was fact question, precluding summary judgment); *Tange v. State of R.I. Dept. of Elderly Affairs*, 120 F.3d 325, 326 (1st Cir. 1997) (events alleged and inferences as to defendants' intent were the

very type of factual disputes that *Johnson* held to be premature so far as appellate review is concerned); *Marshall v. Sullivan*, 105 F.3d 47, 54 (2nd Cir. 1996) (question as to what was told to officer, affecting what knowledge the officer possessed, constituted factual question precluding immediate appellate review); *Maylor v. State of Louisiana Dept. of Corrections*, 123 F.3d 855 (5th Cir. 1997) (order not suited for immediate interlocutory appeal where qualified immunity was denied because of insufficiently developed record); *McLoud v. Testa*, 97 F.3d 1536 (6th Cir. 1996) (factual questions relating to the actor's intent precluded immediate appellate jurisdiction); *Clash v. Beatty*, 77 F.3d 1045 (7th Cir. 1996) (evidentiary dispute of whether it was objectively reasonable for police officer to shove suspect into car, barred immediate appeal)

Clearly, decisions on appellate jurisdiction over interlocutory appeals based upon qualified immunity reflect no

consistency or reliable pattern. For example, the Fourth and Fifth Circuits appear internally divided nearly equally as is reflected by the seven to five vote in *Elliott* and the eight to eight vote in *Colston*. Other conflicts exist between and within the circuits as set out more fully above. Further guidance is necessary from this court in order to avoid the quagmire which is emerging in appellate jurisdiction under the present *Johnson* and *Behrens* framework.

IV. This Court should exercise its supervisory power and grant certiorari because the Fifth Circuit's decision is a significant departure from the accepted and usual course of judicial proceedings in that the Fifth Circuit opinion effectively makes every denial a qualified immunity immediately appealable, in violation of the limited interlocutory review permitted by *Johnson, supra,* and *Behrens, supra.*

The Fifth Circuit has determined that although questions of evidence sufficiency may not be examined on interlocutory appeal, it does have jurisdiction to examine the materiality of the evidence at issue. This is a distinction without a difference and is

in direct conflict with this Court's teaching in *Johnson*. This decision based on the Firth Circuit decision in *Colston, supra,* to allow interlocutory appellate review of a district court's determination, that issues of fact in question are material, would simply mean that every single denial of summary judgment is appealable because every single denial of summary judgment embodies a determination that the issues of fact in question are material. As stated by Judge DeMoss in his *Colston* dissent, " . . . if the issues of fact were not material, summary judgment would have been granted, not denied." *Colston*, 146 F.3d at 294 (DeMoss, J., dissenting.) As this Court pointed out in *Johnson*:

> An interlocutory appeal can make it more difficult for trial judges to do their basic job -- supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional and unnecessary appellate court work, either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.

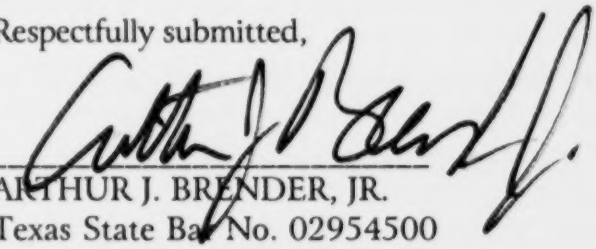
115 S.Ct. at 2154.

By making the materiality decision appealable in every single instance, the Fifth Circuit has opened up each and every case to the evils set out in *Johnson*.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request this Court to issue a Writ of Certiorari, to review the decision of the Court of Appeals to the Fifth Circuit.

Respectfully submitted,



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